Supreme Court, U.S.
FILED
JAN 20 1999
OFFICE OF THE CLERK

No. 98-1228

In the
Supreme Court of the United States

JAMES R. HOWE,

Petitioner,

v.

ANDREW S. RICHARDSON,

and

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

GEORGE M. PRESCOTT JR., ESQ.
LAW OFFICE OF GEORGE M. PRESCOTT
300 Front Street
P.O. Box A
Lincoln, RI 02865
(401) 726-5577 (telephone)
(401) 726-2220 (facsimile)

GEORGE M. PRESCOTT, ESQ.
Counsel of Record
LAW OFFICE OF GEORGE M. PRESCOTT
300 Front Street
P.O. Box A
Lincoln, RI 02865
(401) 726-5577 (telephone)
(401) 726-2220 (facsimile)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

62 + 5 10's

QUESTIONS PRESENTED

An individual bankruptcy debtor may, under Section 522 of the Bankruptcy Code of 1978, exempt from his bankruptcy estate property that is "exempt under . . . State . . . law that is applicable on the date of the filing of the petition . . . ." 11 U.S.C. § 522(b)(2)(A).

(1) How does the language "exempt under . . . State . . . law" delimit the property a debtor may exempt from his bankruptcy estate under Section 522(b)(2)(A)?

(2) If a debtor's property is, on the date he files his bankruptcy petition, exempt from all applicable legal and equitable process under settled state law, and if the debtor claims that property as exempt in his bankruptcy schedules, is that property exempt from the debtor's bankruptcy estate under Section 522(b)(2)(A)?

Under Section 6 of the Bankruptcy Act of 1898, an individual bankruptcy debtor was allowed in bankruptcy the exemptions "prescribed by the State laws in force at the time of the filing of the petition . . . ." At least four times, in 1902, 1905, 1924, and 1943, this Court held that debtors could, under Section 6 of the Act, exempt in bankruptcy property that was exempt from process under state law.

(3) Are these cases still controlling precedent under the Bankruptcy Code?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

I. The United States Court of Appeals for the First Circuit Has Erroneously Decided an Important Question of Federal Law under the Bankruptcy Code of 1978 in a Way That Conflicts with Relevant Decisions of this Court 10

A. The question of what property a bankruptcy debtor may exempt under Section 522(b)(2)(A) of the Bankruptcy Code is important 10

B. The First Circuit's decision is erroneous ... 12

1. The First Circuit's decision directly conflicts with a relevant and controlling decision of this Court under Section 522(b)(2)(A) of the Bankruptcy Code ... 12

2. The First Circuit's decision conflicts directly and in principle with relevant and potentially controlling decisions of this Court under Section 6 of the Bankruptcy Act of 1898 14

3. The First Circuit's misconstruction of Section 522(b)(2)(A) of the Bankruptcy Code led the court to refuse to apply a settled and controlling rule of Rhode Island law 18

II. The First Circuit Has Erroneously Decided an Important Question of Federal Law under the Bankruptcy Code in a Way That Conflicts with Decisions of Other United States Courts of Appeals and with Decisions of United States Bankruptcy Courts 22

A. The First Circuit's decision directly conflicts with a decision of the United States Court of Appeals for the Eighth Circuit under Section 522(b)(2)(A) of the Bankruptcy Code 22

B. The First Circuit's decision conflicts in principle with decisions of the United States Courts of Appeals for the Fourth, Seventh, and Tenth Circuits under Section 522(b)(2)(A) of the Bankruptcy Code 24

C. The First Circuit's decision conflicts in principle with decisions of the United States Courts of Appeals for the Fifth and Ninth Circuits under Section 6 of the Bankruptcy Act 25

D. The First Circuit's decision directly conflicts with decisions of United States Bankruptcy Courts under Section 522(b)(2)(A) of the Bankruptcy Code 25

III. The First Circuit Has Erroneously Decided an Important Question of Federal Law under the Bankruptcy Code in a Way That Directly Conflicts with a Decision of a State Court of Last Resort 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Andresen v. Maryland, 427 U.S. 463, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976) 27

Arkison v. Gitts (In re Gitts), 116 B.R. 174 (B.A.P. 9th Cir. 1990) 17

Burlingham v. Crouse, 228 U.S. 459, 33 S. Ct. 564, 57 L. Ed. 920 (1913) 11

Cappelli v. Wood, 27 R.I. 411, 62 A. 978 (1905) 8, 20

Chapman v. Wells, 557 N.W.2d 725 (N.D. 1996)..... 26

City of New York v. Saper, 336 U.S. 328, 69 S. Ct. 554, 93 L. Ed. 710 (1949) 23

Clark v. Brayshaw (In re Brayshaw), 912 F.2d 1255 (10th Cir. 1990)..... 6

Clark v. O'Neill (In re Clark), 711 F.2d 21 (3rd Cir. 1983) (*per curiam*)..... 6

Cottrell v. Schilling (In re Cottrell), 876 F.2d 540 (6th Cir. 1989)..... 6

Davis v. Davis (In re Davis), 170 F.3d 475 (5th Cir. 1999) (*en banc*)..... 17

England v. Federal Deposit Ins. Corp. (In re England), 975 F.2d 1168 (5th Cir. 1992)..... 6

Greene v. Keene, 14 R.I. 388, 51 Am. Rep. 400 (1884).....19, 20

Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)..... 10

Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 22 S. Ct. 857, 46 L. Ed. 1113 (1902) 16

Holden v. Stratton, 198 U.S. 202, 25 S. Ct. 656, 49 L. Ed. 1018 (1905) 11, 12

Hovis v. Wright, 751 F.2d 714 (4th Cir. 1985)..... 24

Howe v. Richardson et al. (*In re Howe*) 193 F.3d 60 (1st Cir. 1999) ..... *passim*

Howe v. Richardson et al. (*In re Howe*), 232 B.R. 534 (B.A.P. 1st Cir. 1999)..... 9

In re Brissette, 561 F.2d 779 (9th Cir. 1977)..... 25

In re Lewis, 21 B.R. 926 (Bankr. N.D. Ala. 1982) 15

In re Lynch, 187 B.R. 536 (Bankr. E.D. Ky. 1995) 17

In re Mitchell, 73 B.R. 93 (Bankr. E.D. Mo. 1987), *aff'd mem.*, 855 F.2d 859 (8th Cir. 1988).....22, 23

In re Musgrove, 7 B.R. 892 (Bankr. W.D. Va. 1981) 26

In re Thompson, 867 F.2d 416 (7th Cir. 1989)..... 24

In re Yonikus, 996 F.2d 866 (7th Cir. 1993) 6

Ivan Allen Co. v. United States, 422 U.S. 617, 95 S. Ct. 2501, 45 L. Ed. 2d 435 (1975)..... 23

John T. Mather Mem'l Hosp. v. Pearl, 723 F.2d 193 (2nd Cir. 1983) 6

Johnson v. Johnson, 111 R.I. 183, 300 A.2d 642 (1973)..... 8, 16, 18, 21

Lakeside v. Oregon, 435 U.S. 333, 98 S. Ct. 1091, 55 L. Ed. 2d 319 (1978)..... 27

Lasich v. Estate of Wickstrom (In re Wickstrom), 113 B.R. 339 (Bankr. W.D. Mich. 1990) 17

Local Loan Co. v. Hunt, 292 U.S. 234, 54 S. Ct. 695, 78 L. Ed. 1230 (1934) 10

Mainz v. Lederer, 24 R.I. 23, 51 A. 1044 (1902) 8, 20

McKendall v. Patullo, 52 R.I. 258, 160 A. 202 (1932) 8, 9, 12, 16, 18, 21

McManus v. Avco Fin. Servs. of La., Inc., 681 F.2d 353 (5th Cir. 1982) 11

Myers v. Matley, 318 U.S. 622, 63 S. Ct. 780, 87 L. Ed. 1043 (1943) 16

Nunally v. Barick Furniture Co., 103 B.R. 376 (Bankr. D.R.I. 1989) 15

Owen v. Owen, 500 U.S. 305, 111 S. Ct. 1833, 114 L. Ed. 2d 350 (1991) 11, 13, 18

Patterson v. Shumate, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992) 23

Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990) 26

Phillips v. C. Palomo & Sons, 270 F.2d 791 (5th Cir. 1959) 25

Rhode Island Nat'l Bank v. Chase, 16 R.I. 37, 12 A. 233 (1887) 19

Schiavino v. Salzillo, 45 R.I. 203, 121 A. 423 (1923) ..8, 20

Shodeen v. Davenport Cement Co. (In re Aztec Concrete, Inc.), 143 B.R. 537 (Bankr. S.D. Iowa 1992) 15

Slimick v. Silva (*In re Slimick*), 928 F.2d 304 (9th Cir. 1990) 6

Smalley v. Laugenour, 196 U.S. 93, 25 S. Ct. 216, 49 L. Ed. 400 (1905) 16

Steele v. Buel, 104 F. 968 (8th Cir. 1900) 11

Stuart v. Koch (*In re Koch*), 109 F.3d 1285 (8th Cir. 1997) 6

Sumy v. Schlossberg, 777 F.2d 921 (4th Cir. 1985) 6

Theatre Holding Corp. v. Mauro, 681 F.2d 102 (2nd Cir. 1982) (*per curiam*) 16

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988) 23

United States v. Security Indus. Bank, 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982) 10

United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983) 26

Vullo v. Sheets (*In re Sheets*), 69 B.R. 542 (Bankr. W.D.N.Y. 1987) 26

Walker v. Mather (*In re Walker*), 959 F.2d 894 (10th Cir. 1992) 24

White v. Stump, 266 U.S. 310, 45 S. Ct. 103, 69 L. Ed. 301 (1924) 14, 16, 17

STATUTES

Judiciary Act of 1789, ch. 21, 1 Stat. 93 11

11 U.S.C. § 522(b)(2)(A) (1978, as amended) ..... *passim*

11 U.S.C. § 541(a)(1) (1978, as amended) 13

28 U.S.C. § 158(a)(1) (1984, as amended) 6

28 U.S.C. § 158(b)(6) (1984, as amended) 6

28 U.S.C. § 1254(1) (1948, as amended) 1

28 U.S.C. § 1291 (1948, as amended) 6

Bankruptcy Act, ch. 541, 30 Stat. 544 § 6, *codified at* 11 U.S.C. § 24 (1898) 3

Bankruptcy Act, ch. 575, 52 Stat. 840 § 6, *codified at* 11 U.S.C. § 24 (1938) 3

1882 R.I. Pub. Stat. cap. 209, § 4, cl. 14 19

R.I. Gen. Laws 1923 ch. 354, § 4 .....19, 20

R.I. Gen. Laws 1956 § 9-26-4(10) (1997 Reenactment) ..... *passim*

R.I. Gen. Laws 1956 § 9-28-1 (1997 Reenactment) 4, 18, 20, 21

R.I. Gen. Laws 1956 §§ 10-17-1 through -22 (1997 Reenactment) 19, 21

RULES

Rule 10(a) of the Rules of the Supreme Court of the United States (eff. May 3, 1999).....24, 28

Rule 10(c) of the Rules of the Supreme Court of the United States (eff. May 3, 1999).....14, 17

TREATISES

6 Am. Jur. 2d *Attachment and Garnishment* (1963)....15, 22

Robert L. Stern et al., *Supreme Court Practice* (7th ed. 1993) 14

PETITION FOR A WRIT OF CERTIORARI

James R. Howe respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit in *Howe v. Richardson et al.* (*In re Howe*) (*see infra*, Appendix at A-1 – A-9) is reported at 193 F.3d 60 (October 8, 1999, as corrected). The opinion of the United States Bankruptcy Appellate Panel for the First Circuit in *Howe v. Richardson et al.* (*In re Howe*) (*see infra*, App. at A-10 – A-22) is reported at 232 B.R. 534 (March 12, 1999, as corrected). The order of the United States Bankruptcy Court for the District of Rhode Island entered on March 19, 1998 is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on October 8, 1999. The order of the United States Court of Appeals for the First Circuit denying a timely petition for rehearing was entered on November 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1948, as amended).

STATUTORY PROVISIONS INVOLVED

This case involves two (2) sections of the Bankruptcy Reform Act of 1978 ("the Bankruptcy Code"), one (1) section of the Bankruptcy Act of July 1, 1898 ("the Bankruptcy Act"), and two (2) sections of the Rhode Island General Laws of 1956.

Section 541 of the Bankruptcy Code, entitled "Property of the estate," reads in pertinent part as follows:

> (a) **The commencement of a case** under section 301, 302, or 303 of this title [Title 11 of the United States Code] **creates an estate. Such estate is comprised of all the following property**, wherever located and by whomever held:
>
> > (1) Except as provided in subsections (b) and (c)(2) of this section, **all legal and equitable interests of the debtor in property as of the commencement of the case**.

11 U.S.C. § 541(a)(1) (1978, as amended) (West Bankruptcy Code, Rules and Forms, 2000 ed.) (emphasis added).

Section 522 of the Bankruptcy Code, entitled "Exemptions," reads in pertinent part as follows:

> (b) Notwithstanding section 541 of this title, **an individual debtor may exempt from property of the estate** the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. . . . Such property is –

> **(2)(A) any property that is exempt under . . . State . . . law that is applicable on the date of the filing of the petition. . . .**

11 U.S.C. § 522(b)(2)(A) (1978, as amended) (emphasis added).

Section 6 of the Bankruptcy Act originally read, in pertinent part, as follows:

> **This Act shall not affect the allowance to bankrupts of their exemptions which are prescribed by the State laws in force at the time of the filing of the petition. . . .**

Bankruptcy Act, ch. 541, 30 Stat. 544, 548, § 6, *codified at* 11 U.S.C. § 24 (1898) (emphasis added).

Section 6 of the Bankruptcy Act was amended by the Bankruptcy Act Amendments of June 22, 1938 ("the Chandler Act"), ch. 575, 52 Stat. 840, 847 (1938), to allow debtors to claim exemptions prescribed by federal nonbankruptcy law as well as by state law:

> **This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by** the laws of the United States or by **the State laws in force at the time of the filing of the petition** . . . .

Bankruptcy Act § 6, *as amended* by the Chandler Act, *codified at* 11 U.S.C. § 24 (1898, *as amended* 1938), *repealed by* the Bankruptcy Code, § 401(a), Pub. L. No. 95-598, 92 Stat. 2549, 2682 (1978) (emphasis added).

Rhode Island's main exemption statute reads, in pertinent part, as follows:

> **The following** goods and **property shall be exempt from attachment on any warrant of distress or on any other writ, original, mesne, or judicial:**
>
> **(10) Such** other **property**, real, personal, or mixed, **in** possession or **actions as is or shall be exempted from attachment and execution**, either permanently or temporarily, by general or special acts, charters of incorporation, or **by the policy of the law**.

R.I. Gen. Laws 1956 § 9-26-4(10) (1997 Reenactment) (Michie, 1999 Pocket Supplement) (emphasis added).

Rhode Island's creditor's bill in equity statute reads, in pertinent part, as follows:

> Any judgment creditor, after his or her execution has been returned wholly or in part unsatisfied, may, by a civil action in the nature of a creditor's bill, reach and apply and subject to the payment and satisfaction of his or her judgment any equitable estate, any equitable assets, or any choses in action of the judgment debtor, **except such as shall be exempt from attachment by virtue of statutory provision**.

R.I. Gen. Laws 1956 § 9-28-1 (1997 Reenactment) (1999 Pocket Supplement) (emphasis added).

STATEMENT OF THE CASE

Howe filed a voluntary Chapter 7 petition in the United States Bankruptcy Court for the District of Rhode Island ("the Bankruptcy Court") on November 20, 1997. In his Second Amended Schedule C, filed with the Bankruptcy Court in January of 1998, Howe claimed the full value of his contingent, unliquidated choses in action as exempt from his bankruptcy estate under 11 U.S.C. § 522(b)(2)(A), R.I. Gen. Laws 1956 § 9-26-4(10), and the

policy of Rhode Island law "as expressed by its common and decisional law." *See infra*, App. at A-24 – A-25. Howe listed these choses in action as personal property on his Amended Schedule B, filed with the Bankruptcy Court on January 6, 1998.

Chief among these choses in action are contingent and unliquidated claims for wrongful interference with contract and property interests, breach of contract, breach of fiduciary duty, fraud, misrepresentation, and civil conspiracy that Howe has lodged in *Howe v. ALI, Inc. et al.*, Rhode Island Superior Court Civil Action No. PC 95-1924. *See infra*, App. at A-24. Howe has estimated the value of these claims at six hundred thousand dollars ($600,000). *See ibid.*

Andrew S. Richardson, Esq., the trustee of Howe's no-asset Chapter 7 bankruptcy estate, and Rhode Island Depositors Economic Protection Corporation ("DEPCO"), an unsecured creditor of Howe's bankruptcy estate, Appellees below and Respondents here, objected in the Bankruptcy Court to Howe's claim that his contingent, unliquidated choses in action are exempt from his bankruptcy estate.

After notice and hearing, the Bankruptcy Court entered its order sustaining the Trustee and DEPCO's objections to Howe's claim of exemptions ("the exemptions order") on May 19, 1998.

Howe appealed the exemptions order to the United States Bankruptcy Appellate Panel for the First Circuit ("the Panel"). Howe timely filed his notice of appeal with the Bankruptcy Court on May 29, 1998.

The Panel had jurisdiction over Howe's appeal of the exemptions order pursuant to 28 U.S.C. § 158(a)(1) and (b)(6) (1984, as amended). An order sustaining objections to a debtor's claim of exemptions is a final, appealable order. *See Stuart v. Koch* (*In re Koch*), 109 F.3d 1285, 1287 (8th Cir. 1997); *In re Yonikus*, 996 F.2d 866, 868 (7th Cir. 1993); *England v. Federal Deposit Ins. Corp.* (*In re England*), 975 F.2d 1168, 1171-72 (5th Cir. 1992); *Clark v. Brayshaw* (*In re Brayshaw*), 912 F.2d 1255, 1256 (10th Cir. 1990); *Slimick v. Silva* (*In re Slimick*), 928 F.2d 304, 307 (9th Cir. 1990); *Cottrell v. Schilling* (*In re Cottrell*), 876 F.2d 540, 541 (6th Cir. 1989); *Sumy v. Schlossberg*, 777 F.2d 921, 922 (4th Cir. 1985); *John T. Mather Mem'l Hosp. v. Pearl*, 723 F.2d 193, 193 n.1 (2nd Cir. 1983) (*per curiam*); *Clark v. O'Neill* (*In re Clark*), 711 F.2d 21 (3rd Cir. 1983) (*sub silentio*).

The Panel heard oral argument on Howe's appeal on September 17, 1998, and entered its judgment affirming the exemptions order on March 12, 1999. The Panel rendered its written, reported opinion, later corrected, on March 12, 1999. *See infra*, App. at A-10 – A-22.

Howe appealed the Panel's judgment to the United States Court of Appeals for the First Circuit ("the First Circuit"). Howe timely filed his notice of appeal with the Panel on March 22, 1999.

The First Circuit had jurisdiction over Howe's appeal pursuant to 28 U.S.C. § 1291 (1948, as amended).

A panel of the First Circuit heard oral argument on Howe's appeal on September 15, 1999, and entered its judgment affirming the exemptions order on October 8, 1999. The First Circuit rendered its written, reported

opinion, later corrected, on October 8, 1999. *See infra*, App. at A-1 – A-9.

Howe timely filed his petition for panel rehearing with the First Circuit on October 22, 1999. The First Circuit entered its order denying Howe's petition for panel rehearing on November 3, 1999. *See infra*, App. at A-23.

There were and are no disputed factual issues in Howe's appeals to the Panel and to the First Circuit. This case turns on the First Circuit's misapplication of federal bankruptcy law, which led the court, in erroneously affirming the Bankruptcy Court's denial of Howe's claim of exemptions, to refuse to apply the settled, dispositive rule of Rhode Island law that contingent, unliquidated choses in action are exempt from garnishment and from all other legal and equitable process.

REASONS FOR GRANTING THE WRIT

The First Circuit erred, as a matter of federal bankruptcy law, in refusing to determine Howe's exemption rights as of the date Howe filed his bankruptcy petition. The First Circuit further erred, as a matter of federal bankruptcy law, in refusing to recognize that Howe's contingent, unliquidated choses in action are exempt from his bankruptcy estate under 11 U.S.C. § 522(b)(2)(A) because they are exempt from garnishment, and thus from all applicable legal and equitable process, under R.I. Gen. Laws 1956 § 9-26-4(10) and the settled policy of Rhode Island law in that regard as enounced by the Rhode Island Supreme Court.

Howe claimed his contingent, unliquidated choses in action as exempt from his bankruptcy estate under 11 U.S.C. § 522(b)(2)(A), R.I. Gen. Laws 1956 § 9-26-4(10), and the policy of Rhode Island law "as expressed by its common and decisional law." *See infra*, App. at A-24 – A-25. The Rhode Island Supreme Court has repeatedly declared the policy of Rhode Island law that contingent, unliquidated tort and contract choses in action are exempt from garnishment:

> The general rule is that an unliquidated claim cannot be garnisheed [sic]. Accordingly claims founded in tort and for breach of contract are not subject to the process as there is uncertainty from the nature of the claim whether anything will ever be due thereunder.

McKendall v. Patullo, 52 R.I. 258, 261, 160 A. 202 (1932). *Accord Schiavino v. Salzillo*, 45 R.I. 203, 205-06, 121 A. 423 (1923); *Cappelli v. Wood*, 27 R.I. 411, 413, 62 A. 978 (1905); *Mainz v. Lederer*, 24 R.I. 23, 27-28, 51 A. 1044 (1902).

The exception to this rule allows an unliquidated claim to be garnished when it is no longer contingent but fixed, i.e. "where there is a certainty as to liability but a contingency as to amount." *Johnson v. Johnson*, 111 R.I. 183, 188, 300 A.2d 642 (1973). The exception does not apply in the instant case because none of the defendants in Howe's choses in action had been adjudged liable as of November 20, 1997, the date Howe filed his Chapter 7 bankruptcy petition, and so Howe's tort and breach of contract claims against them were then (and are now) contingent and unliquidated.

In the case below, the First Circuit, speaking through Judge Boudin, acknowledged the rule of

McKendall v. Patullo and the validity of "obvious policy objections to a garnishment of an unliquidated debt to the extent that it calls on the garnishee to pay over moneys before they are found to be owed [i.e. before liability has been fixed]." *Howe v. Richardson* (*In re Howe*), 193 F.3d 60, 63 (1st Cir. 1999), *infra*, App. at A-6. However, the court erroneously refused to apply this settled, dispositive rule of Rhode Island exemption law under 11 U.S.C. § 522(b)(2)(A):

> **But here the trustee does not seek garnishment or any immediate payment** at all from those against whom Howe has what we will assume are disputed claims; **rather, the trustee seeks only to take over Howe's *claims*** against those parties, a step that does not implicate the concerns of the *McKendall* court.

In re Howe, 193 F.3d at 63, *infra*, App. at A-6 (emphasis added) (italics in original).

The First Circuit's erroneous decision directly conflicts with a relevant, controlling decision of this Court under Section 522(b)(2)(A) of the Bankruptcy Code; conflicts directly and in principle with relevant, potentially controlling decisions of this Court under Section 6 of the Bankruptcy Act; conflicts directly and in principle with decisions of the United States Courts of Appeals under Section 522(b)(2)(A) of the Bankruptcy Code; conflicts in principle with decisions of the United States Courts of Appeals under Section 6 of the Bankruptcy Act; directly conflicts with decisions of United States Bankruptcy Courts under Section 522(b)(2)(A) of the Bankruptcy Code; and directly conflicts with a decision of a state court of last resort.

For these reasons, this Court should grant certiorari in this case.

I. The United States Court of Appeals for the First Circuit Has Erroneously Decided an Important Question of Federal Law under the Bankruptcy Code of 1978 in a Way That Conflicts with Relevant Decisions of this Court.

A. The question of what property a bankruptcy debtor may exempt under Section 522(b)(2)(A) of the Bankruptcy Code is important.

"[A] central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' " *Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 659, 112 L. Ed. 2d 755 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S. Ct. 695, 699, 78 L. Ed. 1230 (1934)). This "fresh start" bankruptcy policy, *Grogan*, 498 U.S. at 286, 111 S. Ct. at 659, is vitally important to Congress and to individual bankruptcy debtors.

The state-law bankruptcy exemptions countenanced by Congress in 11 U.S.C. § 522(b)(2)(A) "were designed to permit individual debtors to retain exempt property so that they will be able to enjoy a 'fresh start' after bankruptcy." *United States v. Security Indus. Bank*, 459 U.S. 70, 72 n.1, 103 S. Ct. 407, 409 n.1, 74 L. Ed. 2d 235 (1982). "[I]t was Congress's clear intent [in the Bankruptcy Code] that a debtor benefit to the fullest extent possible [from] exemptions granted to him by applicable state laws, ..."

McManus v. Avco Fin. Servs. of La., Inc., 681 F.2d 353, 358 (5th Cir. 1982) (Dyer, J., dissenting), *majority opinion abrogated by Owen v. Owen*, 500 U.S. 305, 310 & n.1, 313-14, 111 S. Ct. 1833, 1836 & n.1, 1838, 114 L. Ed. 2d 350 (1991).

The same was true under the Bankruptcy Act and its predecessors. "It [was] the twofold purpose of the [B]ankruptcy [A]ct to convert the estate of the bankrupt into cash and distribute it among creditors, and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched." *Burlingham v. Crouse*, 228 U.S. 459, 473, 33 S. Ct. 564, 568, 57 L. Ed. 920 (1913).

Indeed, "[i]t has always been the policy of Congress, both in general legislation and in bankrupt acts, to recognize and give effect to the state exemption laws." *Holden v. Stratton*, 198 U.S. 202, 213-14, 25 S. Ct. 656, 659, 49 L. Ed. 1018 (1905).

> From the organization of the federal courts under the [J]udiciary [A]ct of 1789, the law has been that creditors suing in those courts could not subject to execution property of their debtor exempt to him by the law of the state. . . . The same rule has obtained under the bankrupt acts, which have sometimes increased the exemptions, notably so under the [A]ct of 1867, but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule, observed from the creation of our Federal system, should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction.

Steele v. Buel, 104 F. 968, 972 (8th Cir. 1900) (citing Judiciary Act of 1789, ch. 21, 1 Stat. 93, other citations

omitted), *quoted and followed in Holden*, 198 U.S. at 214, 25 S. Ct. at 659-60.

Protecting Section 522(b)(2)(A) of the Bankruptcy Code and state-law exemptions in bankruptcy from evisceration or resection by lower federal courts is essential to effectuating and preserving a debtor's fresh-start.

B. The First Circuit's decision is erroneous.

1. The First Circuit's decision directly conflicts with a relevant and controlling decision of this Court under Section 522(b)(2)(A) of the Bankruptcy Code.

As noted above, *see supra* p. 9, the First Circuit refused to honor the rule of *McKendall v. Patullo*, 52 R.I. 258, 261, 160 A. 202 (1932), that contingent, unliquidated choses in action are exempt from garnishment, and so refused to honor Howe's claim of exemptions under 11 U.S.C. § 522(b)(2)(A). The court held *McKendall v. Patullo* was inapplicable because "**the trustee does not seek garnishment or any immediate payment** at all from those against whom Howe has what we will assume are disputed claims; **rather, the trustee seeks only to take over Howe's *claims*** against those parties, a step that does not implicate the concerns of the *McKendall* court." *In re Howe*, 193 F.3d at 63, *infra*, App. at A-6 (emphasis added) (italics in original).

The First Circuit erred, as a matter of federal bankruptcy law, in refusing to determine Howe's exemption rights as of the date Howe filed his bankruptcy petition.

The court itself acknowledged that Howe's contingent, unliquidated choses in action became part of his estate under 11 U.S.C. § 541(a)(1). *See In re Howe*, 193 F.3d at 61 & n.1, *infra*, App. at A-2. Under Section 541(a)(1) of the Bankruptcy Code, Howe's contingent, unliquidated choses in action passed into his bankruptcy estate the moment his case was commenced, i.e. **the moment he filed his bankruptcy petition**. *See* 11 U.S.C. § 541(a)(1), *supra* p. 2. Under Section 522(b)(2)(A) of the Bankruptcy Code, **this is also the moment at which Howe's right to exempt his contingent, unliquidated choses in action from his bankruptcy estate is determined**. *See* 11 U.S.C. § 522(b)(2)(A) (prescribing that a debtor may exempt from his bankruptcy estate "**property that is exempt under . . . State . . . law that is applicable on the date of the filing of the petition**"), *supra* pp. 2-3 (emphasis added).

The First Circuit's erroneous decision on this temporal point directly conflicts with a relevant, controlling decision of this Court under Section 522(b)(2)(A) of the Bankruptcy Code. "[E]xempt property is determined '**on the date of the filing of the petition,**'. . . ." *Owen*, 500 U.S. at 314 n.6, 111 S. Ct. at 1838 n.6 (quoting 11 U.S.C. § 522(b)(2)(A)) (emphasis added). In *Owen*, this Court soundly rejected the notion that a debtor's exempt property could be determined, for purposes of avoiding a judicial lien upon exempt property under 11 U.S.C. § 522(f)(1), as of the time the judicial lien might have fixed upon the exempt property, *sc.* more than a year before the debtor filed his bankruptcy petition. *See id.*, 500 U.S. at 307, 314 n.6, 111 S. Ct. 1835, 1838 n.6.

By wrongfully postponing Howe's right to claim his contingent, unliquidated choses in action as exempt from

garnishment and as exempt in bankruptcy until such time as there might be an actual garnishment proceeding, the First Circuit gutted Section 522(b)(2)(A) of the Bankruptcy Code and this Court's construction of it in *Owen*.

Certainly, one of the primary offices of the writ of certiorari is mandating that a wayward United States Court of Appeals follow controlling precedent of this Court. *See* Rule 10(c) of the Rules of the Supreme Court of the United States (eff. May 3, 1999); Robert L. Stern et al., *Supreme Court Practice* § 4.5, at 174-75 (7th ed. 1993), and cases cited therein. This Court should grant certiorari in this case.

2. The First Circuit's decision conflicts directly and in principle with relevant and potentially controlling decisions of this Court under Section 6 of the Bankruptcy Act of 1898.

The First Circuit's erroneous decision on this temporal point also directly conflicts with relevant, potentially controlling decision of this Court under Section 6 of the Bankruptcy Act:

> When the law speaks of property which is exempt and of rights to exemptions, it of course refers to some point of time. In our opinion this point of time is . . . the date of the filing of the petition.

White v. Stump, 266 U.S. 310, 313, 45 S. Ct. 103, 104, 69 L. Ed. 301 (1924) (construing Section 6 of the Bankruptcy Act). The property a debtor could exempt from his estate under the Bankruptcy Act (and can

exempt under the Bankruptcy Code) was (and is) **not "property which would or might be exempt if some condition not performed were performed, but . . . property to which there is under the state law a present right of exemption** – one which withdraws the property from levy and sale under judicial process." *White*, 266 U.S. at 313, 45 S. Ct. at 104 (emphasis added).

Again, to insist that Howe must wait to exempt his contingent, unliquidated choses in action from his bankruptcy estate until such time as his creditors or his Chapter 7 trustee might commence garnishment proceedings against the defendants in those choses in action is to ignore the ineluctable dictates of Congress and this Court.

The First Circuit further erred, as a matter of federal bankruptcy law, in refusing to recognize that Howe's contingent, unliquidated choses in action are exempt from his bankruptcy estate under 11 U.S.C. § 522(b)(2)(A) because they are exempt from garnishment under Rhode Island law.

"The term 'garnishment' denotes a proceeding by a creditor to obtain satisfaction of the indebtedness out of property or credits of the debtor in the possession of, or owing by, a third person." 6 Am. Jur. 2d *Attachment and Garnishment* § 2 (1963). Prejudgment garnishment is but a species of attachment, *see, e.g., In re Lewis*, 21 B.R. 926, 927 & n.4 (Bankr. N.D. Ala. 1982), *quoted and followed in Nunally v. Barick Furniture Co.*, 103 B.R. 376, 377 (Bankr. D.R.I. 1989); postjudgment garnishment is but a species of execution. *See, e.g.,*

Shodeen v. Davenport Cement Co. (In re Aztec Concrete, Inc.), 143 B.R. 537, 539 (Bankr. S.D. Iowa 1992).

The exemption of contingent, unliquidated choses in action from garnishment enounced by the Rhode Island Supreme Court in *McKendall v. Patullo* and *Johnson v. Johnson* is an exemption from attachment, execution, and levy and sale – i.e. from all legal process – under R.I. Gen. Laws 1956 § 9-26-4(10). *See supra* pp. 3-4, 8. Notwithstanding the apodictic language of R.I. Gen. Laws 1956 § 9-26-4(10), *McKendall v. Patullo*, and *Johnson v. Johnson*, the First Circuit refused to honor the exemption. *See In re Howe*, 193 F.3d at 63, *infra*, App. at A-6.

The First Circuit's erroneous decision on this qualitative point directly conflicts with at least four relevant and potentially controlling decisions of this Court under Section 6 of the Bankruptcy Act. *See Myers v. Matley*, 318 U.S. 622, 626-28, 63 S. Ct. 780, 783-84, 87 L. Ed. 1043 (1943) (holding property exempt from execution and forced sale under Nevada law was exempt in bankruptcy); *White*, 266 U.S. at 313, 45 S. Ct. at 104 (holding property exempt from levy and sale under state law is exempt in bankruptcy); *Smalley v. Laugenour*, 196 U.S. 93, 97, 25 S. Ct. 216, 217, 49 L. Ed. 400 (1905) (same); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 190, 22 S. Ct. 857, 861, 46 L. Ed. 1113 (1902).

Absent substantive changes in the statutory language, cases decided under the Bankruptcy Act remain good law under the Bankruptcy Code. *See generally Theatre Holding Corp. v. Mauro*, 681 F.2d 102, 105 (2nd Cir. 1982) (*per curiam*). There is no substantive difference between the state-law exemption provisions of

the Bankruptcy Act and the Bankruptcy Code. *Compare* Section 6 of the Bankruptcy Act, *supra* p. 3, *with* Section 522(b)(2)(A) of the Bankruptcy Code, *supra* pp. 2-3.

Lower federal courts have held that this Court's decisions under Section 6 of the Bankruptcy Act still control under 11 U.S.C. § 522(b)(2)(A). *See Davis v. Davis* (*In re Davis*), 170 F.3d 475, 489 (5th Cir. 1999) (*en banc*) (Dennis, J., with whom Politz & Parker, JJ., joined, dissenting) (quoting *White*, 266 U.S. at 313); *Arkison v. Gitts* (*In re Gitts*), 116 B.R. 174, 176 (B.A.P. 9th Cir. 1990) (holding the difference between the Bankruptcy Act and the Bankruptcy Code's definitions of property of the bankruptcy estate "has no significance in determining whether a debtor's asserted exemption is effective. . . . Consequently, the pertinent Act cases are still good law under the Code."); *In re Lynch*, 187 B.R. 536, 540, 543-44 (Bankr. E.D. Ky. 1995) (citing and quoting *White*, 266 U.S. at 312-13, 45 S. Ct. at 103-04, and confirming its codification in 11 U.S.C. § 522(b)(2)(A)); *Lasich v. Estate of Wickstrom* (*In re Wickstrom*), 113 B.R. 339, 343 (Bankr. W.D. Mich. 1990) (quoting *White*, 266 U.S. at 313, 45 S. Ct. at 104, and affirming its applicability under the Bankruptcy Code).

Notwithstanding the foregoing, this Court has yet to step once more unto the breach and declare that its precedents construing Section 6 of the Bankruptcy Act are still controlling under Section 522(b)(2)(A) of the Bankruptcy Code. This is an important question of federal law under the Bankruptcy Code that has not been, but should be, settled by this Court. *See* Rule 10(c) of the Rules of the Supreme Court of the United States. This Court should grant certiorari in this case.

3. The First Circuit's misapplication of Section 522(b)(2)(A) of the Bankruptcy Code led the court to refuse to apply a settled and controlling rule of Rhode Island law.

As noted above, *see supra* pp. 12-13, the First Circuit's failure to recognize that Howe's contingent, unliquidated choses in action were, on the date he filed his bankruptcy petition, exempt from garnishment under settled Rhode Island law was in derogation of the plain language of Section 522(b)(2)(A) of the Bankruptcy Code and this Court's decision in *Owen v. Owen*. The court's temporal error of federal bankruptcy law – failing to determine Howe's exemption rights as of the petition date – and its qualitative error of federal bankruptcy law – failing to recognize that state-law exemption from garnishment, and from all other legal and equitable process, is exemption in bankruptcy – led it to refuse to apply the settled rule of Rhode Island law that contingent, unliquidated choses in action are exempt from garnishment, and from all other legal and equitable process, under R.I. Gen. Laws 1956 § 9-26-4(10), *McKendall v. Patullo*, and *Johnson v. Johnson*.

In turn, these errors of federal bankruptcy law also led the First Circuit to misapply Rhode Island's creditor's bill in equity statute, R.I. Gen. Laws 1956 § 9-28-1. *See supra* p. 4; *In re Howe*, 193 F.3d at 63, *infra*, App. at A-6. In order to demonstrate the lack of any live state-law issue in this case, to preserve all issues for review should this Court grant certiorari, – and, most importantly, to show that contingent, unliquidated choses in action are exempt from all legal and equitable process under

Rhode Island law, – some explanation of this statute, and of the case law that informs its construction, is in order.

In 1882, the Rhode Island General Assembly enacted 1882 R.I. Pub. Stat. cap. 209, § 4, cl. 14, now R.I. Gen. Laws 1956 § 9-26-4(10). Then as now, this statute provided, *inter alia*, that choses in action that are or shall be exempted by the policy of the law are exempt from all legal process. *See supra* pp. 3-4.

At common law, choses in action were exempt from all legal process. The Rhode Island Supreme Court recited and relied upon this rule in *Greene v. Keene*, 14 R.I. 388, 390-91, 51 Am. Rep. 400 (1884), *abrogated on other grounds by* R.I. Gen. Laws 1923 ch. 354, § 4, *now codified as amended at* R.I. Gen. Laws 1956 § 9-28-1, in refusing to allow a judgment creditor to reach his debtor's chose in action via common-law equitable proceedings. *See Greene*, 14 R.I. at 397-98.

Several years after it had decided *Greene v. Keene*, the Rhode Island Supreme Court construed 1882 R.I. Pub. Stat. cap. 209, § 4, cl. 14, now R.I. Gen. Laws 1956 § 9-26-4(10), and held that it protected "not property which is, from its nature, beyond the reach of attachment, but property which it is a matter of public policy to protect from attachment." *Rhode Island Nat'l Bank v. Chase*, 16 R.I. 37, 39, 12 A. 233, 234 (1887), *quoted in In re Howe*, 193 F.3d at 62, *infra*, App. at A-6.

Though the holding in *Chase* was less than pellucid, the First Circuit perspicaciously and plausibly interpreted it to mean that the Rhode Island Supreme Court had eliminated common-law exemptions from legal process from the ambit of what became R.I. Gen. Laws 1956

§ 9-26-4(10), and had instituted a requirement that exemptions thenceforth be affirmatively declared, by either the Rhode Island General Assembly or the Rhode Island Supreme Court, in order to qualify for treatment as the "policy of the law" under the statute. *See In re Howe*, 193 F.3d at 62-63, *infra*, App. at A-6 – A-7.

Beginning in 1902, the Rhode Island Supreme Court affirmatively declared the policy of Rhode Island law that contingent, unliquidated choses in action are exempt from garnishment. *See Mainz v. Lederer*, 24 R.I. 23, 27-28, 51 A. 1044 (1902). The court repeated this declaration in 1905 and 1923. *See Cappelli v. Wood*, 27 R.I. 411, 413, 62 A. 978 (1905); *Schiavino v. Salzillo*, 45 R.I. 203, 205-06, 121 A. 423 (1923).

Also in 1923, the Rhode Island General Assembly enacted R.I. Gen. Laws 1923 ch. 354, § 4, now R.I. Gen. Laws 1956 § 9-28-1, which for the first time subjected some, but not all, choses in action to equitable process, viz. the statutory creditor's bill in equity. *See supra* p. 4. As noted above, this statute abrogated the common-law exemption of choses in action from all equitable process established in *Greene v. Keene*.

The creditor's bill in equity statute did not, however, abrogate the exemption of choses in action from garnishment. By its terms, the statute refers only to "choses in action," *see supra* p. 4, and subjects choses in action to a creditor's bill in equity (statutory equitable process) except to the extent that they are exempt from legal process by statutory provision. *See ibid.* Under R.I. Gen. Laws 1956 § 9-26-4(10), and the policy of Rhode Island law as repeatedly declared by the Rhode Island Supreme Court both before and after the

enactment of the creditor's bill in equity statute in 1923, contingent, unliquidated choses in action are exempt from garnishment and from all other legal process. Thus, they are exempt from a creditor's bill in equity under R.I. Gen. Laws 1956 § 9-28-1.

As noted above, in 1932 the Rhode Island Supreme Court affirmatively reiterated the general rule that contingent, unliquidated choses in action are exempt from garnishment. *See McKendall v. Patullo*, 52 R.I. 258, 261, 160 A. 202 (1932). The court most latterly reiterated this rule in 1973, when it allowed the garnishment of fixed but unliquidated choses in action. *See Johnson v. Johnson*, 111 R.I. 183, 188, 300 A.2d 642 (1973).

Under Rhode Island law, then, only fixed choses in action – those where liability has been reduced to judgment – may be garnished or reached by a creditor's bill in equity.

Since Howe's choses in action are contingent and unliquidated, they are immune from garnishment[1] – the only form of legal process by which a creditor could theoretically reach them, since they are assets in the hands of third persons[2] – and from the statutory

---

[1] Garnishment is known in Rhode Island, as it is in some other New England states, as "trustee process." *See generally* R.I. Gen. Laws 1956 §§ 10-17-1 through -22 (1997 Reenactment). This statute nowhere provides that choses in action may be reached by trustee process.

[2] "An attachment involves only the rights of a creditor in property in the possession of his debtor, whereas garnishment reaches funds, effects, and credits belonging to the principal defendant which are in the hands of or owed by third persons."

creditor's bill in equity – the only form of equitable process by which a creditor could theoretically reach them under the Rhode Island General Laws in light of *Greene v. Keene*. Since they are exempt from all legal and equitable process under Rhode Island law, they are exempt from Howe's bankruptcy estate under 11 U.S.C. § 522(b)(2)(A).

II. The First Circuit Has Erroneously Decided an Important Question of Federal Law under the Bankruptcy Code in a Way That Conflicts with Decisions of Other United States Courts of Appeals and with Decisions of United States Bankruptcy Courts.

A. The First Circuit's decision directly conflicts with a decision of the United States Court of Appeals for the Eighth Circuit under Section 522(b)(2)(A) of the Bankruptcy Code.

In *In re Mitchell*, 73 B.R. 93, 94-95 (Bankr. E.D. Mo. 1987), *aff'd mem.*, 855 F.2d 859 (8th Cir. 1988), the United States Court of Appeals for the Eighth Circuit summarily affirmed the decision of the United States Bankruptcy Court for the Eastern District of Missouri that bankruptcy debtors' contingent, unliquidated choses in action were exempt from the debtors' bankruptcy estates (under 11 U.S.C. § 522(b)(2)(A)) because they were exempt from attachment and garnishment under Missouri common law, which was incorporated in Missouri's main exemption statute. *See In re Mitchell*, 73 B.R. at 94-95.

---

6 Am. Jur. 2d *Attachment and Garnishment* § 4 (1963) (footnotes omitted).

As noted above, Howe's contingent, unliquidated choses in action are exempt from his bankruptcy estate under 11 U.S.C. § 522(b)(2)(A) because they are exempt from garnishment, and from all other legal and equitable process, under Rhode Island common law, which is incorporated into Rhode Island's main exemption statute. The First Circuit refused so to hold; its erroneous decision directly conflicts with the Eighth Circuit's in *In re Mitchell*.[3]

This Court has repeatedly granted certiorari to resolve conflicts among United States Courts of Appeals on important issues of federal bankruptcy law. *See, e.g., Patterson v. Shumate*, 504 U.S. 753, 757, 112 S. Ct. 2242, 2246, 119 L. Ed. 2d 519 (1992) (explaining that certiorari was granted to resolve a conflict among the Courts of Appeals on the construction of 11 U.S.C. § 541(c)(2)); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 368, 108 S. Ct. 626, 628-29, 98 L. Ed. 2d 740 (1988) (explaining that certiorari was granted to resolve a conflict among the Courts of Appeals on the construction of 11 U.S.C. §§ 361 and 362(d)(1)); *City of New York v. Saper*, 336 U.S. 328, 329, 69 S. Ct. 554, 555, 93 L. Ed. 710 (1949) (explaining that certiorari

---

[3] This conflict is no less real or potent because the Eighth Circuit summarily affirmed without published opinion. *See Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24, 95 S. Ct. 2501, 2505, 45 L. Ed. 2d 435 (1975) (explaining that certiorari was granted to resolve a conflict in principle on an important federal tax issue between a decision of the Fifth Circuit and a decision of the Fourth Circuit summarily affirming without published opinion a decision of the United States District Court for the District of Maryland).

was granted to resolve a conflict between the First Circuit and the Second Circuit on an important issue under the Bankruptcy Act). *See generally* Rule 10(a) of the Rules of the Supreme Court of the United States. This Court should grant certiorari in this case.

B. The First Circuit's decision conflicts in principle with decisions of the United States Courts of Appeals for the Fourth, Seventh, and Tenth Circuits under Section 522(b)(2)(A) of the Bankruptcy Code.

The First Circuit's erroneous decision also conflicts in principle with decisions of the United States Courts of Appeals for the Fourth, Seventh, and Tenth Circuits. *See Walker v. Mather* (*In re Walker*), 959 F.2d 894, 897-98 nn.4, 5 (10th Cir. 1992) (upholding under § 522(b)(2)(A) a debtor's claim of exemption of certain annuities under Oklahoma law, which exempted such annuities from attachment, execution, or other forced sale); *In re Thompson*, 867 F.2d 416, 418 (7th Cir. 1989) ("[T]he Bankruptcy Code permits a debtor to take out of the bankrupt estate property that is exempt from execution under either state or federal law.") (*per* Posner, J.); *Hovis v. Wright*, 751 F.2d 714, 715-17 (4th Cir. 1985) (upholding under § 522(b)(2)(A) a debtor's claim of exemption of certain contributions to the South Carolina Retirement System under South Carolina law, which exempted such contributions from levy and sale, garnishment, attachment, or any other process, and preserved to a bankruptcy debtor the right to claim exemptions under state law not included in the state bankruptcy exemption statute).

C. The First Circuit's decision conflicts in principle with decisions of the United States Courts of Appeals for the Fifth and Ninth Circuits under Section 6 of the Bankruptcy Act.

The First Circuit's erroneous decision also conflicts in principle with decisions of the United States Courts of Appeals for the Fifth and Ninth Circuits under Section 6 of the Bankruptcy Act. *See In re Brissette*, 561 F.2d 779, 783 (9th Cir. 1977) (holding, in construing Section 6 of the Bankruptcy Act, that "the federal and state statutes to which Section 6 refers do not officially purport to be bankruptcy exemptions. Rather, they are statutes designed to protect certain kinds of the debtors' assets from attachment or execution by their creditors in ordinary judicial proceedings to collect debts."), and 786 ("The general rule is that property exempt from execution by state creditors is exempt under Section 6); *Phillips v. C. Pálomo & Sons*, 270 F.2d 791, 796 & n.2 (5th Cir. 1959) (upholding, under Section 6 of the Bankruptcy Act, debtors' claim of exemption of certain personalty under Texas law, which exempted certain family personalty from attachment, execution, and "every other species of forced sale for the payment of debts.").

D. The First Circuit's decision directly conflicts with decisions of United States Bankruptcy Courts under Section 522(b)(2)(A) of the Bankruptcy Code.

The First Circuit's decision also directly conflicts with the holdings of two United States Bankruptcy Courts under Bankruptcy Code Section 522(b)(2)(A).

See Vullo v. Sheets (*In re Sheets*), 69 B.R. 542, 543-44 & n.4 (Bankr. W.D.N.Y. 1987) (holding that debtors were entitled to the settlement proceeds of choses in action that had been contingent and unliquidated when their bankruptcy petition was filed, which choses in action the debtors had properly claimed as exempt from their bankruptcy estate under New York statutory law immunizing such choses in action from process); *In re Musgrove*, 7 B.R. 892, 895 (Bankr. W.D. Va. 1981) (holding that the debtor's contingent, unliquidated personal injury claim was exempt from process under Virginia common law and so was exempt from his bankruptcy estate).

This Court has granted certiorari to resolve conflicts among United States Bankruptcy and District Courts on important issues of federal bankruptcy law under the Bankruptcy Code. *See, e.g., Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557, 110 S. Ct. 2126, 2130, 109 L. Ed. 2d 588 (1990); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 202, 103 S. Ct. 2309, 2312, 76 L. Ed. 2d 515 (1983). This Court should grant certiorari in this case.

III. The First Circuit Has Erroneously Decided an Important Question of Federal Law under the Bankruptcy Code in a Way That Directly Conflicts with a Decision of a State Court of Last Resort.

In *Chapman v. Wells*, 557 N.W.2d 725 (N.D. 1996), the North Dakota Supreme Court held that funds held in an individual retirement account (an "IRA") on the date a debtor filed her bankruptcy petition were exempt from her attorney's postpetition lien for services rendered

because they were exempt from attachment, execution, levy and sale, and all other legal process under North Dakota law. *See Chapman*, 557 N.W.2d at 728, 730-31.

Prior to the filing of the bankruptcy petition, the debtor's funds had been held in an employer retirement account (a "401K") until they were rolled over into an IRA. Had the funds been in a 401K at the time of filing, they would have been exempt from the debtor's bankruptcy estate in an unlimited dollar amount under 29 U.S.C. § 1056(d)(1). The court expressly determined the exemption as of the date the bankruptcy petition had been filed, *see Chapman*, 557 N.W.2d at 731 (citing 11 U.S.C. § 522(b)(2)(A)), and held that though the funds were not 401K funds exempt in an unlimited amount under 29 U.S.C. § 1056(d)(1), they were IRA funds exempt up to one hundred thousand dollars under North Dakota law.

As noted above, *see supra* pp. 9, 12-15, the First Circuit erred as a matter of federal bankruptcy law in refusing to determine Howe's exemption rights as of the date Howe filed his bankruptcy petition. *See In re Howe*, 193 F.3d at 63, *infra*, App. at A-6.

The First Circuit's erroneous decision on this temporal point directly conflicts with a relevant decision of a state court of last resort. This Court has granted certiorari to resolve direct conflicts between United States Courts of Appeals and state courts of last resort concerning questions of federal law. *See, e.g., Andresen v. Maryland*, 427 U.S. 463, 470 n.5, 96 S. Ct. 2737, 2743 n.5, 49 L. Ed. 2d 627 (1976); *Lakeside v. Oregon*,

435 U.S. 333, 336 & n.3, 98 S. Ct. 1091, 1093 & n.3, 55 L. Ed. 2d 319 (1978).[4] *See generally* Rule 10(a) of the Rules of the Supreme Court of the United States. This Court should grant certiorari in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari submitted by Petitioner James R. Howe.

Respectfully submitted,

GEORGE M. PRESCOTT JR., Esq.
LAW OFFICE OF
GEORGE M. PRESCOTT
300 Front Street
P.O. Box A
Lincoln, RI 02865
(401) 726-5577 (telephone)
(401) 726-2220 (facsimile)

GEORGE M. PRESCOTT, Esq.
Counsel of Record
LAW OFFICE OF
GEORGE M. PRESCOTT
300 Front Street
P.O. Box A
Lincoln, RI 02865
(401) 726-5577 (telephone)
(401) 726-2220 (facsimile)

[4] Note that the state courts of last resort in these cases lay outside the circuits in which the federal courts of appeals, with whose decisions on questions of federal law the state courts' decisions conflicted, were located.

No. _____

In the

Supreme Court of the United States

JAMES R. HOWE,

Petitioner,

v.

ANDREW S. RICHARDSON

and

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

James R. HOWE, Debtor, Appellant,

v.

Andrew S. RICHARDSON, Esquire, Chapter 7 Trustee, Appellee,

and

Rhode Island Depositors Economic Protection Corp., Unsecured Creditor, Appellee.

No. 99-9005.

United States Court of Appeals, First Circuit.

Heard Sept. 15, 1999.

Decided Oct. 8, 1999.

George M. Prescott, Jr. with whom George M. Prescott and Law Office of George M. Prescott were on brief, for appellant.

Andrew S. Richardson with whom Thomas P. Quinn and Boyajian, Harrington & Richardson were on brief, for Chapter 7 trustee, appellee.

Justin T. Shay with whom Charles S. Beal and Cameron & Mittleman LLP were on brief for unsecured creditor, appellee.

Before SELYA, Circuit Judge, CAMPBELL, Senior Circuit Judge, and BOUDIN, Circuit Judge.

BOUDIN, Circuit Judge.

On November 20, 1997, James Howe filed a petition in the federal bankruptcy court in Rhode Island under chapter 7, 11 U.S.C. § 701 *et seq.* In amended schedules, he

claimed as exempt three legal claims then pending or to be asserted by him in different courts, assigning them values as follows: a claim for personal injuries sustained by Howe in a motor vehicle accident ($15,000); a claim for breach of contract and related wrongs ($600,000); and a claim to recover on a dishonored check ($10). Like all of Howe's property as of the date he filed for bankruptcy, his legal claims became part of the bankruptcy "estate" under the Bankruptcy Code, 11 U.S.C. § 541(a)(1), and are available to his creditors, unless they are exempt property.[1]

The Bankruptcy Code permitted Howe to retain "any property that is exempt under . . . [Rhode Island] or local law," 11 U.S.C. § 522(b)(2)(A), but the Code does not say "exempt" from what. Obviously, the general notion is exempt from creditors, not (say) exempt from local property taxes. Some states have statutes listing property that is exempt "for purposes of bankruptcy," *e.g.*, Ga.Code Ann. § 44-13-100, but Rhode Island law is less explicit. Nevertheless, one provision listing property "exempt from attachment" includes a series of items akin to those commonly exempted in bankruptcy (*e.g.*, wearing apparel, working tools up to $500, furniture up to $1,000, homestead up to $100,000), R.I. Gen. Laws §§ 9-26-4,-4.1, and the parties accept that the listing sets forth bankruptcy exemptions.

---

[1] Prior to 1978, whether property passed to the estate depended on what property was transferable and subject to seizure under state law; but the new Code adopted a general rule that the estate includes all of the debtor's property interests, including intangibles. *See Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 707-09 (9th Cir.1986).

The three legal claims sought to be exempted by Howe do not fit within any specific category in sections 9-26-4 and 9-26-4.1; but Howe argued that they do fit within a catch-all category, comprising "[s]uch other property, real, personal, or mixed, in possession or actions as is or shall be exempted from attachment and execution, either permanently or temporarily, by general or specific acts, charters of incorporation, or by the policy of the law." R.I. Gen. Laws § 9-26-4(10). Howe argued in the bankruptcy court that under Rhode Island common law, his unliquidated legal claims against others could not be seized and that they therefore fell within the statute's provision for property "exempted from attachment and execution . . . by the policy of the law."

The trustee and an unsecured creditor objected, and the bankruptcy court rejected Howe's position, as well as other arguments not pressed on this appeal. The Bankruptcy Appellate Panel sustained the bankruptcy court. Howe has now appealed to this court. He contends, and we assume this to be true, that "the policy of the law" phrase includes exemptions that would otherwise qualify even if they exist in common rather than statutory law. *Cf. Arch Lumber Co. v. Dohm*, 81 R.I. 69, 98 A.2d 840 (1953) (exempting children's toys). The critical question is what Rhode Island law provides as to unliquidated legal claims and whether what it provides amounts to a bankruptcy exemption.

In previous centuries, it was very hard in a law action for a creditor to lay hands on potential legal claims that the debtor might have against a third party or even an unliquidated debt where the obligation was admitted but the amount in dispute. Pre-judgment "attachment," to

establish jurisdiction or secure an anticipated judgment, was not generally available as to any property at common law, *Martin v. Lincoln Bar, Inc.*, 622 A.2d 464, 469 (R.I.1993); *see generally* Crandall, Hagedorn & Smith, *The Law of Debtors and Creditors* § 6.04[1][b], at 6-33 (rev. ed.1991). As for post-judgment "execution" against the debtor's assets, this was achieved through specific writs (*e.g., fieri facias* authorizing seizure and sale of personal property) that failed to reach equitable interests of the debtor and certain intangibles. Crandall, *supra*, § 6.05[5][a], at 6-115.

Thereafter, pre-judgment attachment was developed as a remedy by statute. *E.g.*, R.I. Gen. Laws § 10-5-1 *et seq.* Postjudgment remedies were expanded initially by the equity courts, which allowed a "creditor's bill," one of whose functions was to reach equitable interests of the debtor that fell outside the common law writs. Crandall, *supra*, § 6.05[5][a], at 6-115 to 6-116. Statutes, in turn, have expanded and in some measure supplanted the non-statutory common law and equitable remedies of judgment creditors. *E.g.*, R.I. Gen. Laws §§ 9-26-1 *et seq.*, 9-28-1 *et seq.*

There is a false neatness to this picture. The Rhode Island statutes pertaining to such remedies are a tangle of provisions cobbled together over time; they use words like "attachment" with somewhat different meanings in different contexts; and they include other important remedies, such as garnishment – which may be pre or post-judgment – to reach debtor assets in the hands of third parties, R.I. Gen. Laws §§ 10-17-1 et seq. Statutory statements that such and such may or may not be

"attached" appear, variously phrased, in various locations. *E.g.*, *id.* §§ 9-26-4, 9-26-4.1, 9-26-5, 36-10-34.

Still, nothing in the Rhode Island statutes to which we have been directed expresses any affirmative policy against the attachment, either pre or post-judgment, of a debtor's legal claims *as a class*. Certainly specific kinds of legal claims (*e.g.*, to receive pensions or back wages) are affirmatively protected to one degree or another from attachment, *e.g.*, R.I. Gen. Laws § 9-26-4(8), (12), and we will return to Rhode Island's special treatment of attempts to assign personal injury claims. But there is no general statutory bar to seizure of intangibles. Indeed, as we shall see, Rhode Island law facilitates such seizures. Against this background, we return to the question of what meaning should be given to section 9-26-4(10).

In Howe's view, that his legal claims could not (we will assume) be attached at common law pre-judgment, or executed against post-judgment, means that Rhode Island does have a "policy of the [common] law" that "exempt[s] from attachment and execution" such legal claims. But an alternative view is that the failure of common law remedies to reach such claims should be regarded merely as a gap in the law, reflecting the writ-based character of the common law (no writ, no right) and not as an "exemption" reflecting a policy or purpose to safeguard such interests from seizure by creditors in general or bankruptcy creditors in particular.

Either reading of section 9-26-4(10) accords with its language, and fortunately we have an answer from the Rhode Island courts as to how they construe the section. In *Rhode Island Nat. Bank v. Chase*, 16 R.I. 37, 12 A. 233

(1887), the state supreme court faced a claim that the predecessor to this section prevented attachment of someone's interest in life insurance policies that had no cash surrender value, the objection being made that the property interest was not attachable because it was "equitable, uncertain and contingent." *Id.* at 234. In language that effectively rejects Howe's present position, the court said that "property which is meant to be protected by the exemption referred to is not property which is, from its nature, beyond the reach of attachment, but property which it is a matter of public policy to protect from attachment." *Id.*[2]

Howe counters by saying that the insurance policies in *Chase* had an ascertainable value and refers us to *McKendall v. Patullo*, 52 R.I. 258, 160 A. 202 (1932), in which the Rhode Island Supreme Court referred to "[t]he general rule . . . that an unliquidated claim cannot be garnished." *Id.* at 203. There are obvious policy objections to a garnishment of an unliquidated debt to the extent that it calls on the garnishee to pay over moneys before they are found to be owed. But here the trustee does not seek garnishment or any immediate payment at all from those against whom Howe has what we will assume are disputed claims; rather, the trustee seeks only to take over Howe's claims against those third parties, a step that does not implicate the concerns of the *McKendall* court.

---

[2] *Chase* was not a bankruptcy case. The statutory issue arose because the policy holder had assigned such of his property as was not "exempt from attachment"; one party said that this assignment did not include the insurance policies with no cash surrender value because they would be so exempt under section 9-26-4(10)'s predecessor. *Chase*, 12 A. at 233-34.

There is further evidence that Rhode Island has no general policy against attachment of claims against third parties. In the course of codifying execution remedies for judgment creditors, Rhode Island enacted a statutory provision codifying and arguably expanding the old creditor's bill devised by the equity courts. R.I. Gen. Laws § 9-28-1. This provision permits an unsatisfied judgment creditor to reach "any equitable estate, any equitable assets, or any choses in action of the judgment debtor, except such as shall be exempt from attachment by virtue of statutory provision." On its face, this language refutes any claim that Rhode Island is hostile to creditors taking over debtors' legal claims against third parties.[3]

Howe responds by pointing to the just quoted qualification ("except such . . . "), arguing that this incorporates section 9-26-4(10)'s reference to "policy" exemptions. But we have already explained why, under *Chase*, the gap left at common law as to intangibles is not properly viewed as an exemption at all. Further, Howe's contrary view would virtually moot the inclusion in section 9-28-1 of "any choses in action of the judgment debtor" since in general these were not subject to attachment at common law and, on Howe's reading, would have been added by the statute as a remedy only to be immediately subtracted by the "except such" proviso.

Howe's approach to section 9-26-4(10) was rejected by the Supreme Court, in an analogous context, almost a

---

[3] This statute has been deemed unconstitutional by this court for lack of procedural safeguards, *Dionne v. Bouley*, 757 F.2d 1344 (1st Cir.1985), but these defects do not concern Rhode Island's willingness to allow attachment of intangibles.

century ago. *Page v. Edmunds*, 187 U.S. 596, 23 S.Ct. 200, 47 L.Ed. 318 (1903). Still, one can find more recent decisions looking in both directions. *Compare In re Geise*, 992 F.2d 651, 658-59 (7th Cir.1993) (holding that property not subject to sequestration is not therefore exempt), *with In re Mitchell*, 73 B.R. 93 (Bankr.E.D.Mo.1987) (holding property exempt where, *inter alia*, claim not subject to garnishment, *aff'd* 855 F.2d 859 (8th Cir.1988)). In the end almost everything turns on how an individual state construes its own mix of statutes and common law rules pertaining to exemptions. Happily, *Chase* provides us such guidance, even though Howe can find scraps of language in his favor in other Rhode Island cases. But who would expect otherwise after more than a century of decisions?

This brings us to a different, narrower issue, namely, whether Rhode Island law "exempts" personal injury claims from being reached by creditors even though it does not exempt claims against third parties in general from attachment or execution. Interestingly, the "federal" list of exemptions does provide an exemption of up to $16,150 for a debtor's right to receive actual compensation for "personal bodily injury" (not including pain and suffering or compensation for actual pecuniary loss). 11 U.S.C. § 522(d)(11)(D). But Howe chose the alternative list of exemptions available under Rhode Island law, and while one can imagine that Rhode Island might have a policy reflecting the same protective concerns toward bodily injury, neither Rhode Island's statutes nor its case law adopts such a position.

What Rhode Island cases do express is a policy of refusing to enforce the "assignment" of personal injury

claims before they are reduced to judgment. *Tyler v. Superior Court*, 30 R.I. 107, 73 A. 467 (1909). But this rule, although apparently still in force, is based on concerns – reflected in the now hoary rules against champerty and maintenance – about promoting litigation by "intermeddling volunteers" who purchase personal injury claims "for their own profit." *Etheridge v. Atlantic Mut. Ins. Co.*, 480 A.2d 1341, 1344-46 (R.I.1984). Those concerns are pretty faint in the case of a bankruptcy trustee who is simply trying to muster the bankrupt's property for the benefit of creditors, none of whom likely wanted to be in the business of pursuing the debtor's claims against anyone.

While we have found no Rhode Island case directly in point, its courts have sensibly relaxed the ban against assignment of personal injury claims where the concerns just noted are not implicated. *E.g., id.* at 1345; *see also DeSenne v. Jamestown Boat Yard, Inc.*, 968 F.2d 1388, 1390 (1st Cir.1992) (applying Rhode Island law). Thus, it strikes us as doubtful that Rhode Island's anti-assignment policy would bar an assignment in favor of creditors. However this may be, we think it clear in light of *Chase* that the Rhode Island policy limiting assignability of personal injury claims would never be described as an "exemption" within the meaning of section 9-26-4(10).

Affirmed.

In re James R. HOWE, Debtor.

James R. Howe, Appellant,

v.

Andrew S. Richardson, Chapter 7 Trustee and Rhode Island Depositors Economic Protection Corporation, Appellees.

BAP No. RI 98-041.

United States Bankruptcy Appellate Panel of the First Circuit.

March 12, 1999.

George M. Prescott, George M. Prescott, Jr., Law Office of George M. Prescott, Lincoln, RI, on brief for James R. Howe.

Andrew S. Richardson, Boyajian Harrington & Richardson, Providence, RI, on brief for Andrew S. Richardson, Chapter 7 Trustee.

Justin T. Shay, Charles S. Beal, Cameron & Mittleman, LLP, Providence, RI, on brief for Rhode Island Depositors Economic Protection Corporation.

Before GOODMAN, LAMOUTTE, and BOROFF, U.S. Bankruptcy Judges.

BOROFF, Bankruptcy Judge.

Before the Bankruptcy Appellate Panel is the appeal of debtor, James R. Howe ("Howe" or "Debtor"), from a final order, dated May 19, 1998, issued by the United States Bankruptcy Court for the District of Rhode Island. That order sustained the objections of the Chapter 7 trustee and the Rhode Island Depositors' Economic Protection Corporation ("DEPCO") to the Debtor's asserted

exemption in three (3) contingent, unliquidated claims against third parties. Specifically, the question before us is whether Rhode Island law provides its bankruptcy debtors with an unlimited exemption for unliquidated and contingent tort or contract-based claims. The bankruptcy court answered in the negative. After careful review of Howe's challenges to the order, we affirm.

JURISDICTION

Under 28 U.S.C. § 158, the Bankruptcy Appellate Panel has jurisdiction to hear appeals from final judgments, orders and decrees. 28 U.S.C. § 158(a), 28 U.S.C. § 158(b)(1). Courts of appeals view finality in bankruptcy proceedings as more flexible than in other types of cases. *See England v. Federal Deposit Ins. Corp.*, 975 F.2d 1168, 1171 (5th Cir.1992). Although other issues may remain for resolution in a case after the determination of the Debtor's claimed exemptions, orders granting or denying exemptions are appealable as final orders under 28 U.S.C. § 158. *See id.* at 1172; *In the Matter of Yonikus*, 996 F.2d 866, 868 (7th Cir.1993).

SCOPE OF REVIEW

The parties do not raise any disputed factual issues for review. Howe's challenge to the decision of the court below is purely legal in nature, and thus we review de novo the bankruptcy court's legal conclusions. *See Bruin Portfolio, LLC v. Leicht* (*In re Leicht*), 222 B.R. 670, 671 (1st Cir. BAP 1998); *LaRoche v. Amoskeag Bank* (*In re LaRoche*), 969 F.2d 1299, 1301 (1st Cir.1992).

BACKGROUND

On November 20, 1997, Howe filed a voluntary petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Rhode Island. In his bankruptcy Schedule B, the Debtor listed what he described as three contingent, unliquidated claims,[1] two of which were the subject of pending state court actions. Those assets consisted of (1) a claim with an estimated value of fifteen thousand dollars ($15,000) for personal injuries allegedly sustained by the Debtor in a motor vehicle accident; (2) claims with an estimated value of six hundred thousand dollars ($600,000) against various third parties for wrongful interference with contract and property interests, breach of contract, breach of fiduciary duty, fraud, misrepresentation, and civil conspiracy; and (3) a claim with a nominal value of ten dollars ($10) for recovery on account of a dishonored check[2] (together the "Choses In Action").

Howe also listed the Choses in Action in his Second Amended Schedule C as fully exempt, and claimed as a

---

[1] The Debtor describes the claims as "contingent" and "unliquidated." They are undoubtedly unliquidated, but we have little or nothing before us to indicate the extent to which the claims are contingent; that is, where liability is dependent on "some future event that may never happen." See Black's Law Dictionary 321 (6th ed.1990). Nevertheless, the extent to which the claims set forth below are contingent is not material to our inquiry.

[2] As to the dishonored check claim, Howe asserts (and the Chapter 7 trustee does not deny) that although Howe is a party to the suit, he is not entitled to collect on the check.

basis therefor, Section 9-26-4(10) of the Rhode Island General Laws "and the policy of the law of the State of Rhode Island as expressed by its common and decisional law." Both the Chapter 7 trustee and DEPCO objected to the claimed exemptions, and the Bankruptcy Court sustained those objections. The instant appeal followed.

DISCUSSION

At issue in this appeal is the relationship, if any, in the state of Rhode Island between the immunity of choses in action from creditor process under common law and the exemption of property from creditor claims. Howe contends that because a debtor's contingent, unliquidated claims against third parties are not subject to attachment and garnishment by creditor process under Rhode Island law, that characteristic constitutes an exemption which is the policy of that state's law and therefore cognizable under 11 U.S.C. § 522(b)(2)(A). The soundness of that argument is the gravamen of our inquiry.

A bankruptcy estate includes, with limited exception, all of the interests in property, both equitable and legal, which the debtor held as of the time of the commencement of the case. *See* 11 U.S.C. § 541(a)(1); *Owen v. Owen*, 500 U.S. 305, 308, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1991). Notwithstanding the breadth of § 541, a debtor may claim certain classes of property as exempt from the estate. 11 U.S.C. § 522. Section 522(b) affords debtors an election between those exemptions provided in § 522(d) or, alternatively, exemptions available under state and federal non-bankruptcy law. *See* 11 U.S.C. § 522(b)(2)(A). Section 522(b)(1) also permits each individual state to "opt out"

of the § 522(d) exemption scheme, thereby removing that option for its bankruptcy debtors. 11 U.S.C. § 522(b)(1). Rhode Island is among the minority of states which have not "opted out" of the § 522(d) exemption scheme in favor of their own exemptions, and thus Rhode Island bankruptcy debtors retain the option of selecting either of the alternatives set forth in § 522(b).

Howe selected the exemption scheme available under Rhode Island law. He first argues that property exempt in bankruptcy is synonymous with property not subject to creditor process under state common law, citing *White v. Stump*, 266 U.S. 310, 45 S.Ct. 103, 69 L.Ed. 301 (1924) and *Smalley v. Laugenour*, 196 U.S. 93, 25 S.Ct. 216, 49 L.Ed. 400 (1905) (property exempt from levy and sale under state law is exempt from the estate). He also points to limitations imposed by the Bankruptcy Code on the powers of a trustee in bankruptcy under 11 U.S.C. § 544(a).[3]

---

[3] Section 544(a) provides in relevant part

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by –
>
> (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

11 U.S.C. § 544(a).

The Debtor's reliance on the foregoing cases is misplaced. They interpreted the Bankruptcy Act of 1898, not the Bankruptcy Code. Under § 541(a)(1) of the Bankruptcy Code, property of the estate includes choses in action, even if contingent and unliquidated and thus not subject to attachment under state law. *See* House Report No. 95-595, 95th Cong., 1st Sess. 367-8 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 82-3 (1978); *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 709 (9th Cir.1986); *In re Tomaiolo*, 205 B.R. 10 (Bankr.D.Mass.1997). The inclusion of choses in action within the sweep of § 541 represented a significant departure from the more limited composition of the bankruptcy estate under the Bankruptcy Act. Under § 70(a)(5) of the Bankruptcy Act, rights of action were not included in the bankruptcy estate unless subject to "attachment, execution, garnishment, sequestration, or other judicial process." 11 U.S.C. § 110(a)(5) (1898), *superceded by* Bankruptcy Reform Act of 1978, 11 U.S.C. § 101 *et seq.* Section 541 eliminated the requirement that property of a bankruptcy estate be transferable or subject to process by creditor action under state law. *In re Geise*, 992 F.2d 651, 655 (7th Cir.1993); *In re Hunter*, 970 F.2d 299, 302 (7th Cir.1992). The Bankruptcy Code was intended to go beyond the limitations of creditor process law in defining property of the estate. Therefore, under the Bankruptcy Code, a debtor's exemption rights in property can not be based solely on the property's insulation from attachment, levy and sale alone. *In re Geise, supra; In re Hunter, supra.*

Similarly, Howe's reliance on § 544(a) is without merit. Section 544(a) affords a trustee in bankruptcy the

right to avoid various prepetition transfers. That avoidance power has certain limitations. However, the exemption of property under § 522(b) does not constitute a "transfer" for the purposes of § 544(a). *See In re Whalen-Griffin*, 206 B.R. 277, 288 (Bankr.D.Mass.1997); *In re Robbins*, 187 B.R. 400, 403 (Bankr.D.Mass.1995); *Feinman v. Messia (In re Messia)*, 184 B.R. 176, 177 (Bankr.D.Mass.1995). Therefore, the limitations of § 544(a) are not related to a debtor's rights of exemption under § 522.

The Debtor next turns to Rhode Island's expressions of policy in its statutory law, and argues that the Choses In Action are exempt under R.I.Gen.Laws § 9-26-4(10) (1997 Reenactment). Section 9-26-4, entitled *Property Exempt from Attachment*, reads in pertinent part as follows: "[t]he following goods and property shall be exempt from attachment on any warrant of distress or on any other writ, original, mesne or judicial . . . (10)[s]uch other property, real, personal, or mixed, in possession or actions as is or shall be exempted from attachment and execution, either permanently or temporarily, by general or special acts, charters of incorporation, *or by the policy of the law*" (emphasis added). Howe does not argue that there exist general or special acts of the State of Rhode Island which support his claimed exemption, nor that such an exemption is included in Rhode Island's charter of incorporation. Howe contends only that exemption of the Choses in Action is the "policy of the law" in the State of Rhode Island. Therefore, only if the policy of Rhode Island law supports an exemption from attachment of the Choses In Action is the exemption available.

Nowhere in § 9-26-4, nor elsewhere in the Rhode Island General Laws, is the phrase "policy of the law" defined. Nor have we been able to find any legislative history to assist in understanding what is meant by the term. Consequently, we turn to Rhode Island case law to discern its meaning.

The Rhode Island Supreme Court has considered the scope of earlier codifications of § 9-26-4(10) on two occasions. In *Rhode Island Nat. Bank v. Chase*, 16 R.I. 37, 12 A. 233 (1887), the court was asked to interpret an instrument by which a decedent had assigned, during his life, for the benefit of creditors, all of his property, except "so much thereof . . . as [was] by law exempt from attachment." The executor of the decedent's estate claimed that certain insurance policies owned by the decedent had not thereby been assigned to creditors, because they were by their nature exempt from attachment. The court disagreed. Following the case of *In re Keach*, 14 R.I. 571 (1884), the court ruled first that the term "exempt from attachment" excepted only property protected from attachment by Rhode Island's *statutory* exemption and not by common law. *Id.* at 234. The Court then reviewed the statutory predecessor of § 9-26-4(1)[4] and rejected the notion that its exemption of attachment in property exempt by the "policy of the law" was intended to protect all property which by its nature was beyond the reach of attachment. *Id.* "In our opinion the property which is meant to be protected by the exemption referred to is not property which is, from its nature, beyond the reach of

---

[4] The statute, formerly 1882 R.I.Pub.Laws ch. 209 § 1(14), was identical in text to the present § 9-26-4(10).

attachment, but property which it is a matter of public policy to protect from attachment." *Id.*

The Rhode Island Supreme Court had occasion to review another predecessor to § 9-26-4(10) in *Arch Lumber Co. v. Dohm*, 81 R.I. 69, 74, 98 A.2d 840 (1953). In that case, the court affirmed the determination of a trial court that pursuant to the statute,[5] which also exempted from attachment property exempted by the "policy of the law," it was the policy of the law of Rhode Island to exempt from attachment children's toys, including bicycles, a play pen and a child's desk and chair. *Id.* at 843. The Court observed that "the policy of the law favored exempting things of that nature from attachment." However, the Court noted that the policy of the law might differ when applied to "uncommon and overly expensive things which are sometimes referred to as toys and given to some children as playthings." *Id.* Further definition of the scope of "the policy of the law" was left for another day. That day has not yet arrived.

Neither of the foregoing decisions supports Howe's position, and *Chase* directly contradicts his argument in two respects. First, *Chase* belies the Debtor's argument that in the State of Rhode Island property exemptions exist independent of statutory enactment, based solely on the unavailability of creditor process against that property. Second, both cases dictate that a court look at the identity of the property and not to its legal nature to

---

[5] The statute, formerly 1952 R.I.Pub.Laws ch. 3032 § 1(14), was likewise identical in text to the present § 9-26-4(10).

determine what is subject to the § 9-26-4(10) statutory exemption.

More importantly, nothing in the case law of the State of Rhode Island would lead us to surmise that the character of the Choses In Action would render them *sui generis* exempt as the "policy of the law" of the State of Rhode Island. On the contrary, in *Ellbey v. Cunningham*, 54 R.I. 4, 168 A. 815, 816 (1933), a case in which the Rhode Island Supreme Court held that a judgment debt owed by a third party to a debtor could be garnished by a creditor, the court noted that "[i]t would be an anomaly in our statutory law if, when the sole personal estate of the debtor consisted of judgment debts, such debts should be enforced for the benefit of the debtor and shielded by the law from the just demands of his creditors." *Id.* at 816. Although *Ellbey* is distinguishable from the matter before us because *Ellbey* related to the attachment of a fixed and liquidated claim, we believe that the court's statement reflects a clear policy to apply to the payment of debt as much of a debtor's property as is not necessary for the debtor's needs. That view is consistent with the court's expressions in *Arch Lumber*, 98 A.2d at 843. We therefore believe that Howe's interpretation of "the policy of the law" falls outside of the remedial purpose of the exemptions as articulated by the Rhode Island Supreme Court.[6]

---

[6] Additionally, one treatise on Rhode Island Civil Procedure restricts the meaning of § 9-26-4(10) even further, as being only a reference to exemptions found elsewhere in the General Laws. Ronald J. Resmini, *Civil Practice and Procedure* § 391 (1996). These include specific exemptions for the pensions of police officers and firefighters (§ 9-26-5), pensions of municipal employees (§ 36-10-34), worker's compensation

The Debtor's reliance on the Rhode Island Supreme Court's decision in *Greene v. Keene*, 14 R.I. 388 (1884), is misplaced. In that case, the court held that a judgment creditor could not subject a debtor's chose in action to the payment of the creditor's judgment, in the absence of fraud, because the legislature had provided no mechanism by which execution could be had against a chose in action. However, the Rhode Island legislature subsequently responded by enacting Rhode Island Gen.Laws § 9-28-1,[7] which specifically allows a creditor to reach and apply choses in action which are not otherwise statutorily exempt. Thus, the holding of *Greene* has been abrogated by the Rhode Island Legislature. Choses in action may now be reached by creditors, unless statutorily exempt. And reliance on that exception serves only to lead us back to our original inquiry.

Howe's position is not without support, however. At least two jurisdictions follow the rule which Howe proposes. The Bankruptcy Court for the Eastern District of Missouri held in *In re Mitchell* that contingent, unliquidated claims for personal injuries were not attachable

---

benefits or claims (§ 28-33-27), and other narrowly drawn exemptions. Whether such a constricted reading of § 9-26-4(10) is supported by the case law is beyond the scope of this inquiry; however, the interpretation put forward does indicate a much narrower reading of the relevant statute than that which Howe advocates.

[7] Rhode Island Gen.Laws § 9-28-1, entitled *Creditor's Equitable Action*, provides creditors with an equitable remedy to "reach and apply and subject to the payment and satisfaction of his or her judgment . . . any choses in action . . . except such as shall be exempt from attachment by virtue of statutory provision."

under Missouri law, and thus were exempt from the debtors' estate:

> [W]hile there is no explicit statutory exemption in Missouri for unliquidated personal injury claims, any property of the estate which is effectively exempt from attachment and execution under Missouri law may be allowed as an exemption in bankruptcy. According to Missouri's opt out statute a debtor may exempt property of the estate which is "exempt from attachment and execution under the law of the State of Missouri." This statutory language permits Missouri residents to claim exemptions created by statutory and constitutional law as well as common law.

In re Mitchell, 73 B.R. 93, 94-95 (Bankr.E.D.Mo.1987) (citations omitted) *aff'd without opinion*, 855 F.2d 859 (8th Cir.1988). *See also Eanes v. Shepherd*, 33 B.R. 984, 986-987 (W.D.Va.1983) *rev'd without opinion*, 735 F.2d 1354 (4th Cir.1984).

We could answer by noting that the reasoning in *Mitchell* was criticized in *In re Gaines*, 106 B.R. 1008, 1017-1019 (Bankr.W.D.Mo.1989), *overruled on other grounds*, 121 B.R. 1015 (W.D.Mo.1990), *dismissed without opinion*, 985 F.2d 564 (8th Cir.1991). Or, we could rely on those courts which have variously ruled that immunity from creditor process as a matter of state common law did not, in their opinion, equate with an exemption of the property from creditors. *See In re Geise*, 992 F.2d 651 at 655-56; *In re Leck*, 113 B.R. 500 (Bankr.W.D.Wis.1990); *In re Richards*, 57 B.R. 662 (Bankr.D.Nev.1986); *In re Mills*, 46 B.R. 525, 526 (Bankr.S.D.Fla.1985). We do neither, as the interpretation of those courts as to the choices made by the states under their consideration are largely irrelevant

to the interpretation before us. Our task is to determine whether the exemption of contingent or unliquidated claims is the "policy of the law" in the state of Rhode Island. The Rhode Island Supreme Court has stated that "where the [statutory] language used is ambiguous, or admits of more than one meaning, it is to be taken in such sense as will conform to the scope of the act and carry out the purpose of the statute." *Berard v. Blais*, 56 R.I. 431, 186 A. 475, 477 (1936). Our reading of the Rhode Island General Laws as exemplified by the decisions of the Rhode Island Supreme Court do not support Howe's position. Howe has asked us to overlook the statements of policy regarding the treatment of debtors' assets made by the Rhode Island Supreme Court in *Chase, Arch Lumber,* and *Ellbey*. We decline. We believe that the statutes cited by Howe do not support the breadth of his interpretation of § 9-26-4(10); and the case law demonstrates, in contrast to Howe's position, a policy which would tend to include, rather than exclude, the choses in action which he seeks to exempt. Consequently, we hold that § 9-26-4(10) does not permit a debtor to exempt property solely because it is by its nature exempt from creditor process at common law. To hold otherwise would be to legislate a new and radically altered state law exemption scheme for the State of Rhode Island, which we have neither the power nor the inclination to do.

CONCLUSION

For the reasons set forth above, we conclude that the court below properly applied § 9-26-4(10) in denying Howe's claimed exemption.

The Bankruptcy Court's Order is **AFFIRMED**.

United States Court of Appeals
For the First Circuit

No. 99-9005

JAMES R. HOWE,
Plaintiff, Appellant,

v.

ANDREW S. RICHARDSON, CHAPTER 7, TRUSTEE
Defendant, Appellee.

DEPCO
Defendant Appellee,

BEFORE
Torruella, Chief Judge,
Campbell, Senior Circuit Judge
Selya, Boudin, Stahl, Lynch, and Lipez, Circuit Judges,

ORDER OF COURT
Entered: November 3, 1999

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
Phoebe Morse, Clerk

By JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs, Prescott, Richardson, Beal, Shay & Prescott, Sr.]

In re JAMES R. HOW[redacted] Case No. [redacted]14870
Debtor (If known)

SECOND AMENDED

SCHEDULE C - PROPERTY CLAIMED AS EXEMPT

Debtor elects the exemptions to which debtor is entitled under:

(Check one box)

☐ 11 U.S.C. § 522(b)(1): Exemptions provided in 11 U.S.C. § 522(d). Note: These exemptions are available only in certain states.

x☒ 11 U.S.C. § 522 (b)(2): Exemptions available under applicable nonbankruptcy federal laws, state or local law where the debtor's domicile has been located for the 180 days immediately preceding the filing of the petition, or for a longer portion of the 180-day period than in any other place, and the debtor's interest as a tenant by the entirety or joint tenant to the extent the interest is exempt from process under applicable nonbankruptcy law.

DESCRIPTION OF PROPERTY	SPECIFY LAW PROVIDING EACH EXEMPTION	VALUE OF CLAIMED EXEMPTION	CURRENT MARKET VALUE OF PROPERTY WITHOUT DEDUCTING EXEMPTION
Debtor's household furniture, furnishings & effects located at Debtor's residence	G.L.R.I.(1956) Section 9-26-4(3)	$1,000.00	$1,000.00
Debtor's wearing apparel	G.L.R.I. (1956) Section 9-26-4(1)	$1,000.00	$1,000.00
Negotiable promissory note due to Debtor from The Howson Corporation dated October 2, 1992	G.L.R.I. (1956) Section 9-26-4(7)	$140,000.00	$140,000.00
Contingent and unliquidated claim for personal injuries sustained in a motor vehicle accident on 1/11/97 in North Providence	G.L.R.I. (1956) Section 9-26-4(10) and the policy of the law of the State of R.I. as expressed by its common and decisional law.	Full value of Debtor's claim $15,000(est.)	Full value of Debtor's claim $15,000(est.)
Contingent and unliquidated claims for wrongful interference with contract and property interests, breach of contract, breach of fiduciary duty, fraud, misrepresentation and civil conspiracy asserted in R.I. Superior Court C.A. 95-1924 James R. Howe vs. ALI, INC. ET AL	G.L.R.I. (1956) Section 9-26-4(10) and the policy of the law of the State of R.I. as expressed by its common and decisional law.	Full value of Debtor's claims $600,000(est.)	Full value of Debtor's claims $600,000(est.)

See next sheet....

BEST AVAILABLE COPY

In re JAMES R. HOW[redacted] Case No. [redacted] - 14870
Debtor (If known)

SECOND AMENDED

SCHEDULE C - PROPERTY CLAIMED AS EXEMPT

Debtor elects the exemptions to which debtor is entitled under:

(Check one box)

☐ 11 U.S.C. § 522(b)(1): Exemptions provided in 11 U.S.C. § 522(d). Note: These exemptions are available only in certain states.

☒ 11 U.S.C. § 522 (b)(2): Exemptions available under applicable nonbankruptcy federal laws, state or local law where the debtor's domicile has been located for the 180 days immediately preceding the filing of the petition, or for a longer portion of the 180-day period than in any other place, and the debtor's interest as a tenant by the entirety or joint tenant to the extent the interest is exempt from process under applicable nonbankruptcy law.

DESCRIPTION OF PROPERTY	SPECIFY LAW PROVIDING EACH EXEMPTION	VALUE OF CLAIMED EXEMPTION	CURRENT MARKET VALUE OF PROPERTY WITHOUT DEDUCTING EXEMPTION
Contingent and unliquidated claim to recover for dishonored check. Debtor is not party entitled to recovery and the value of his interest is nominal. Claim is asserted in The Howson Corporation, d/b/a James Howe Company and James R. Howe v. New Bedford Institution for Savings, R.I. Superior Court C.A. 93-2922	G.L.R.I.(1956) Section 9-26-4(10) and the policy of the law of the State of Rhode Island as expressed by its common and decisional law.	Full value of Debtor's Interest Nominal value of $10.	Nominal value of $10.
Vacant-unbuildable lot on Dundas Ave., Warwick, RI AP 334, Lot 179	G.L.R.I. (1956) Section 9-26-4(10) and the policy of the law of the State of Rhode Island as expressed by its common and decisional law.	Full value of Debtor's interest Nominal value of $10. Assessed value of whole: $4,100.	Nominal value of $10. Assessed value of whole: $4,100.

DATED: January ___, 1998

SIGNATURE OF DEBTOR:

James R. Howe

BEST AVAILABLE COPY